Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

ERBEN A. HUNZIKER, DONALD M. FURMAN,
R. FRIEDRICH AND SONS, INC. and
BUCK CONSTRUCTION COMPANY, INC.
Petitioners,
vs.
STATE OF IOWA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF IOWA

PETITION FOR WRIT OF CERTIORARI

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55 pp

QUESTIONS PRESENTED

This case presents questions which involve this Court's decision in Lucas v. South Carolina Coastal Council and related cases.

1. Whether a regulatory taking occurs when, but not until, the implementation of an enabling statute impacts property to the extent that all of its economically viable use is taken.

2. Whether there is a difference between an enabling statute that may be implemented in the future to regulate property, and a statute that immediately and directly regulates property.

3. Whether a property owner's right to compensation under the Fifth Amendment is transferable.

PARTIES TO THE PROCEEDING

The parties to the proceeding are listed in the caption.

RULE 29.1 STATEMENT

R. Friedrich and Sons, Inc. and Buck Construction Company, Inc. are corporations but are not parent nor subsidiary corporations.

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PETITION FOR WRIT OF CERTIORARI

The Plaintiffs respectfully pray that a Writ of Certiorari issue to review a decision of the Iowa Supreme Court.

OPINIONS BELOW

The Iowa Supreme Court issued its decision on July 27, 1994. (App. A) The Iowa Supreme Court denied Petitioners' request for rehearing of the case on September 21, 1994. (App. B)

JURISDICTION

This case involves the regulatory taking of a lot suitable for construction of a single family residence, which use the State of Iowa by and through its state archaeologist has prohibited and thereby has taken all economically viable use of the property.

The Petitioners sought relief under the Fifth and Fourteenth Amendments to the United States Constitution from the Iowa District Court on the basis that the governmental action was a regulatory taking of their property without just compensation. The federal questions were thus raised at the earliest opportunity and were briefed and argued in all Iowa Courts.

The District Court denied the Petitioners compensation. That decision was timely appealed to the Iowa Supreme Court which also denied compensation to the Petitioners. A timely petition for rehearing was denied by the Iowa Supreme Court on September 21, 1994. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257.

CONSTITUTIONAL PROVISIONS

Fifth Amendment, United States Constitution:

> ". . . nor shall private property be taken for public use, without just compensation."

Fourteenth Amendment, United States Constitution:

> "Section 1. . . . nor shall any State deprive any person of life, liberty, or property without due process of law; . . ."

STATEMENT OF THE CASE

In 1976 the Iowa Legislature passed Ancient Human Remains statutes[1] that enable the state archaeologist, after making a significant find, to either (a) have the remains removed and reinterred in a cemetery established specifically for that purpose or (b) refuse permission to remove and reinter the remains and thereby prohibit the use of the property that would in any way disturb the remains.

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[1]Section 263B.7 Code of Iowa, authorizes the state archaeologist to investigate, preserve and reinter discoveries of ancient human remains more than 150 years old. Section 263B.8 Code of Iowa, establishes a cemetery for reburial of ancient human remains found in the state. Section 263B.9 Code of Iowa, authorizes the state archaeologist to deny permission to disinter ancient human remains. Section 716.5(2) Code of Iowa, makes it a criminal offense to disinter ancient human remains that have been designated as a significant find by the state archaeologist.

On May 1, 1990, the Plaintiffs home builders sold Lot 15[2] to Dr. Jon Fleming for him to construct a family residence. In April, 1991, just prior to excavation for the basement of Dr. Fleming's house, an unknown individual had the state archaeologist probe for ancient human remains. In one of twelve probes the state archaeologist found an approximately one cubic inch of human vertebrae and three other small fragments of vertebrae surfaces plus five tiny unidentifiable fragments. The state archaeologist thereupon designated a 34 foot diameter burial mound with a 50 foot buffer zone around that as a "significant find" under the Ancient Remains Statute of the Code of Iowa on Lot 15, and warned Dr. Fleming in a letter dated April 30, 1991, of the criminal penalties concerning disinterment of the remains. It is uncontroverted that prior to the action of the state archaeologist making a significant find that neither the Plaintiffs nor Dr. Fleming had any idea or indication that ancient human remains might exist on Lot 15.

The Plaintiffs thereupon refunded Dr. Fleming his purchase price of the lot plus his architectural fees involved with the lot. Dr. Fleming in turn conveyed back and assigned to the Plaintiffs in a Quit Claim Deed all his right, title, interest, estate, claim and demand in Lot 15. This was done by the Plaintiffs as a normal and proper business act of good will.

The Plaintiffs then offered to the state archaeologist that they would move the mound and its remains, at their expense, to a site in a wooded city park, which the state archaeologist refused to allow. The state archaeologist also

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[2]Lot 15 of the Second Addition to Northridge Parkway Subdivision, Ames, Iowa.

refused to disinter the ancient human remains and reinter them in the special cemetery established under the Code of Iowa for reburial of ancient human remains.

There is no dispute in this case that a regulatory taking has occurred. There is no dispute in this case that all economically viable use of the property in question has been taken.[3] The dispute in this case is whether the Plaintiffs should be precluded from receiving just compensation for this regulatory taking.

The majority decision of the Iowa Supreme Court in a split decision[4] cited the Lucas case[5] as authority to deny the Plaintiffs just compensation since Lot 15 was purchased after the passage of these enabling statutes[6] in 1976 and 1978. The majority decision cited the Lucas case as authority for its holding that all property owners who purchase their property after the passage of the Ancient Human Remains statutes in 1976 and 1978 are precluded from receiving just compensation for a taking under these statutes.

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[3]The only economically viable use of Lot 15, the construction of a family residence, was taken. The market value of Lot 15 was reduced from $59,000 to $100 by the regulatory action of the state archeologist. The majority and dissenting opinions of the lower court recognized that there was a regulatory taking in this case. The majority opinion states that "there was no fact issue on the issue of taking." The dissenting opinion stated that "The prohibition by the State of Iowa from using the burial mound in the instant case is a complete taking because there is no practical use of it left to the Plaintiffs."

[4]Hunziker & Furman, et al. v. State, 519 N.W.2d 367 (1994).

[5]Lucas v. South Carolina Coastal Council, 505 U.S. _____, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992).

[6]The term enabling statute is defined in the text on pages 6-7.

The dissenting opinion of the Iowa Supreme Court ruled that the Lucas case supports the Plaintiffs' claim for just compensation. It recognized that the mere passage of these enabling statutes do not constitute a taking. It held that the regulatory taking occurred at the point of time that the government implemented these statutes against Lot 15 which impacted the property to the extent that all economically viable use of the property was taken. It ruled that under the authority of the Lucas case the Plaintiffs are entitled to just compensation for this regulatory taking.

REASONS FOR GRANTING THE WRIT

INTRODUCTION

The majority decision of the lower court misconstrued and misapplied the rulings of this Court in Lucas, and other previous cases, to preclude these Plaintiffs from receiving just compensation for a regulatory taking of their property. The majority decision of the lower court incorrectly held that the Lucas case is authority for its ruling that any property owners who purchase property after the passage of an enabling statute, but before its implementation, are precluded from receiving just compensation for a regulatory taking of their property. This lower court decision, unless reversed, will bar all property owners in the State of Iowa from ever receiving just compensation for a taking under these Ancient Human Remains statutes. Further, This lower court decision, unless reversed, will be used as authority, contrary to the Lucas case, to improperly preclude property owners from receiving just compensation guaranteed to them by the Fifth Amendment.

The lower court decision in this case is in conflict with, and contrary to, the rulings of this Court in not only Lucas v. South Carolina Coastal Council[7]; but also in Keystone Bituminous Coal Ass'n v. DeBenedicts[8]; Hodel v. Virginia Surface Mining and Reclamation Association, Inc.[9], First English Evan. Luth. Ch. v. Los Angeles Cty.,[10] MacDonald, Sommer and Frates v. Yolo County[11], and Williamson County Regional Planning v. Hamilton Bank[12], which all rule that a taking occurs when, but not until, the governmental action in question impacts a property to the extent that all economically viable use is taken.

Amplification from this Court is needed to clarify and confirm the rule that a regulatory taking occurs at the point of time, but not until, an enabling statute is implemented by a final decision that impacts a property to the extent that all economically viable use of the property is taken. The term enabling statute, as used herein, encompasses a statute or

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[7]Lucas v. South Carolina Coastal Council, 505 U.S. _____, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992).

[8]Keytone Bituminous Coal Ass'n v. DeBenedicts, 480 U.S. 470, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987).

[9]Hodel v. Virginia Surface Mining and Reclamation Association, Inc., 452 U.S. 264, 101 S.Ct. 2352, 69 L.Ed.2d 1 (1981).

[10]First English Evan. Luth. Ch. v. Los Angeles Cty., 482 U.S. 304, 96 S.Ct. 2378, 96 L.Ed.2d 250 (1987).

[11]MacDonald, Sommer and Frates v. Yolo County, 477 U.S. 340, 106 S.Ct. 2561, 91 L.Ed.2d 285 (1986).

[12]Williamson County Regional Planning v. Hamilton Bank, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985).

decree which is not self-executing, but is implemented and impacts the land by the regulatory action of a governmental agency, board, administrator, etc. The dissenting opinion of the lower court correctly recognized the Lucas case as authority entitling these Plaintiffs to just compensation from the regulatory taking by the state archaeologist implementing the Ancient Human Remains statute against Lot 15. Guidance from this Court is needed to establish a rule recognizing the difference between an enabling statute and a statute that directly regulates property.

Finally, both the majority and dissenting opinions recognize that Dr. Fleming assigned Plaintiffs his rights to compensation due to inverse condemnation. Thus, this case also presents the question of whether a property owner's right to compensation under the Fifth Amendment is transferable as one of the "bundle of rights" that accompanies the sale of property. This Court's guidance is needed to answer this question in the affirmative.

I. AMPLIFICATION IS NEEDED TO CLARIFY AND CONFIRM THE RULE THAT A REGULATORY TAKING OCCURS WHEN, BUT NOT UNTIL, THE IMPLEMENTATION OF AN ENABLING STATUTE IMPACTS PROPERTY TO THE EXTENT THAT ALL OF ITS ECONOMICALLY VIABLE USE IS TAKEN

The Lucas case does not establish a rule, as the lower court has incorrectly fashioned, that if an enabling statute is passed prior to the purchase of a parcel of land the purchaser is precluded from receiving just compensation for a

regulatory taking of that land. The Lucas case instead provides that a landowner is to receive just compensation for a newly legislated or decreed regulatory taking. The Lucas case implies, but does not specifically state, the rule that when an enabling statute is implemented, the regulatory taking occurs at the time the statute is implemented. Amplification is needed to clarify and confirm the rule that when an enabling statute is implemented, the regulatory taking occurs at that point of time since it is at that point of time that all economically viable use and/or investment backed expectations in the land are taken.

A. The lower court's failure to recognize that a regulatory taking occurs at the point of time that, but not until, the government action impacts the property to the extent that all economical use is taken is in conflict with previous decisions of this Court

It is clear in this case that the regulatory action of the state archaeologist prohibiting the use of Lot 15 for the construction of a family residence has taken all the economically viable use of that lot. There has been a regulatory taking of Lot 15 in this case from the impact of the regulatory action of the state archaeologist refusing permission to rebury the ancient human remains elsewhere. However, in spite of the Lucas decision which held that the constitutional guarantee of just compensation includes regulatory takings, the majority decision of the Iowa Supreme Court denied these Plaintiffs just compensation.

The majority decision of the lower court misconstrued the Lucas case and improperly denied these Plaintiffs just compensation on the basis that the Iowa Statutes in question were passed before Lot 15 was purchased. The lower court erred in holding that any taking under these Ancient Human Remains statutes occurred when they were passed in 1976 and 1978. The regulatory taking occurred in this case in 1991 when these statutes were implemented.

The majority decision of the lower court is contrary to, and in conflict with, the Lucas, Keystone, Hodel, First English, MacDonald, and Williamson County cases which establish the rule that the mere passage of a statute does not constitute a taking, and that there is no taking until a final decision applies the statutes in question against the property and impacts the property to the extent that all its economically viable use is taken.

The Hodel case involved a preenforcement challenge to a regulatory statute, which can properly be characterized as an enabling statute. This Court recognized that the "taking" question is done on essentially an ad hoc basis when there is an actual taking. (Emphasis Added.) This Court recognized that the mere enactment of an enabling statute does not in and of itself constitute a taking. It was also recognized that a taking occurs at the time when the owner is denied the economically viable use of his property. This Court stated as follows:[13]

> Because appellees' taking claim arose in the context of a facial challenge, it presented no concrete controversy concerning either application of the Act to particular surface mining operations or

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[13]452 U.S. at 296 and 297, 101 S.Ct. at 2370 and 2371.

its effect on specific parcels of land. Thus, the only issue properly before the District Court and, in turn, this Court, is whether the "mere enactment" of the Surface Mining Act constitutes a taking. See Agins v. Tiburon, 447 U.S. 255, 260, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106 (1980). The test to be applied in considering this facial challenge is fairly straightforward. A statute regulating the uses that can be made of property effects a taking if it "denies an owner economically viable use of his land . . . ." Agins v. Tiburon, supra, at 260, 100 S.Ct., at 2141. See Penn Central Transp. Co. v. New York City, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978). The Surface Mining Act easily survives scrutiny under this test.

First, the Act does not, on its face, prevent beneficial use of coal-bearing lands. Except for the proscription of mining near certain locations by § 522(e), the Act does not categorically prohibit surface coal mining; it merely regulates the conditions under which such operations may be conducted. The Act does not purport to regulate alternative uses to which coal-bearing lands may be put. Thus, in the posture in which these cases comes before us, there is no reason to suppose that "mere enactment" of the Surface Mining Act has deprived appellees of economically viable use of their property.

The Keystone case also involved a facial constitutional challenge to an enabling statute where it was again recognized that the mere passage of a statute does not in and of itself constitute a taking, and that a taking does not occur until the point of time that the government regulation impacts the property to the extent that all economically viable use is taken. This Court stated as follows:[14]

> The posture of the case is critical because we have recognized an important distinction between a claim that the mere enactment of a statute constitutes a taking and a claim that the particular impact of government action on a specific piece of property requires the payment of just compensation. This point is illustrated by our decision in Hodel v. Virginia Surface Mining & Reclamation Assn., Inc., 452 U.S. 264, 101 S.Ct. 2352, 69 L.Ed.2d 1 (1981), in which we rejected a preenforcement challenge to the constitutionality of the Surface Mining Control and Reclamation Act of 1977.

Likewise, the Iowa Ancient Human Remains statutes in question, on their face, do not immediately or directly regulate Lot 15. A family dwelling could have been constructed on Lot 15 anytime before the state archaeologist made a significant find and denied permission to rebury the remains in the special cemetery established for that purpose. If the state archaeologist had determined the find was not significant, a family dwelling could have been constructed on

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[14]480 U.S. at 493, 107 S.Ct. at 1246.

Lot 15. If the state archaeologist had allowed the ancient human remains to be reburied in the special cemetery established for that purpose, a family dwelling could have been constructed on Lot 15.

When the Ancient Human Remains statutes in question were passed, no landowner in the entire state had any notice whether the statutes applied to their property, and there was no way of knowing whether the state archeologist would grant or deny permission to disinter and rebury any ancient human remains if and when the statutes were applied to their property. It is not until the state archaeologist takes the regulatory action under the enabling statutes in question of denying permission to rebury the ancient human remains in the special cemetery established for that purpose, that a regulatory taking occurs under these Ancient Human Remains statutes. The regulatory taking, in this case, occurred after the purchase of Lot 15. The regulatory taking, in this case, therefore, comes within the purview of the Lucas case which entitles these Plaintiffs to just compensation for the regulatory action of the state archaeologist newly decreeing the denial of permission to rebury the ancient human remains.

The Lucas case recognized that the "Fifth Amendment is violated when land use regulation . . . '*denies an owner economically viable use of his land*'"[15] (Emphasis Added.) It was further stated "We think, in short that there are good reasons for our frequently expressed belief that when the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common

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[15]505 U.S. at _____, 112 S.Ct. at 2894.

good, that is, to leave his property economically idle, he has suffered a taking."[16] (Emphasis Added.)

The Lucas case states that any limitation so severe that it prohibits all economically beneficial use of land cannot be "newly legislated or decreed" without compensation.[17] The majority decision of the lower court erred in failing to recognize that the implementation of the Ancient Human Remains statutes against Lot 15 was a newly decreed regulatory taking. The dissenting opinion of the Iowa Supreme Court correctly found that the implementation of the Ancient Human Remains statute against Lot 15 was a newly decreed regulatory taking for which the Plaintiffs are entitled to just compensation under the Fifth Amendment pursuant to the Lucas case.

The thoughtful and expressive dissenting opinion of the Iowa Supreme Court states as follows:

> The prohibition by the State of Iowa from using the burial mound in the instant case is a complete taking because there is no practical use of it left to the plaintiffs. It is more insidious than zoning laws that we have held to effect a taking when they deny the economically viable use of the land. See Against v. City of Tiburon, 447 U.S. 255, 260, 100 S. Ct. 2138, 2141, 65 L.Ed. 2d 106, 112 (1980); Osborn v. City of Cedar Rapids, 324 N.W.2d 47, 474 (Iowa 1982); Woodbury County Soil Conservation Dist. v. Ortner, 279 N.W.2d 276, 278 (Iowa 1979). It is pernicious because

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[16]505 U.S. at _____, 112 S.Ct. at 2895.

[17]505 U.S. at _____, 112 S.Ct. at 2900.

there is virtually no notice to a landowner of the State's claim and no opportunity to review the government action or appeal to the courts.

The Iowa statutes cited as preventing full ownership of land containing a burial mound give no notice of the State's inchoate claim of authority to deny compensation while prohibiting use. See Iowa Code §§ 263B.7, 263B.9, and 716.5(2) (1993). Nor do they state or even imply that land with a burial mound bears a perpetual cloud on the title removable only by authority of the state archaeologist. Section 305A.9, giving the state archaeologist authority to deny permission to disinter human remains, is not a self-executing statute creating a covenant running with the land. By its own terms the statute is implemented only by an application for permission to disinter. Moreover, there is no indication from the language of these statutes that the legislature intended to take property for historical or scientific inspiration without paying for it.

In this case, a dead bones doctrine has risen from the soil, like a phoenix, to consume the live marrow of land ownership. The history surrounding these ancient bones should be preserved by granting compensation for its resurrection.

The date when an enabling statute is passed is not the significant date of concern when considering a regulatory taking. The significant date of concern under an enabling statute is the date that the regulatory action of the government implements the statute to impact upon the property to the extent that there is a substantial interference with investment backed expectations, and/or when the owner is deprived of all economically viable use of the property.

B. The lower court's ruling is contrary to previous decisions of this court concerning the taking date, ripeness and when an action for inverse condemnation accrues.

The majority decision of the Iowa Supreme Court in this case is contrary to the taking date, ripeness and accrual of action rules established by this Court. The majority decision of the lower court incorrectly would require a property owner to challenge these Ancient Human Remains statutes at the time they were passed, regardless of whether they have been or ever will be applied to a particular property. The MacDonald and Williamson County cases hold in reference to a regulatory taking that a taking has not occurred, and a case is not ripe for judicial review, until the government makes a final decision and thereafter fails to provide adequate compensation for the taking.

This Court in the MacDonald case[18] held as follows:

> A court cannot determine whether a regulation has gone "too far" unless it knows how far the regulation goes. Id. at 106 S.Ct. 2566. Until a property owner has "obtained a final decision regarding the application of the zoning ordinance and subdivision regulations to its property," "it is impossible to tell whether the land retain[s] any reasonable beneficial use or whether [existing] expectation interests ha[ve] been destroyed." Williamson Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 186, 190, n. 11, 105 S.Ct. 3108, 3116, 3118, n. 11, 87 L.Ed.2d 126 (1985). Id. at 106 S.Ct. 2566.
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> ("[T]he State's action here is not 'complete' until the State fails to provide adequate compensation for the taking" (footnote omitted)). Id. at 106 S.Ct. 2566.
>
> Our cases uniformly reflect an insistence on knowing the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit it. Id. at 106 S.Ct. 2567.

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[18]MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 106 S.Ct. 2561, 91 L.Ed.2d 285 (1986).

This Court in the Williamson County case[19] held as follows:

> As the Court has made clear in several recent decisions, a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue. In Hodel v. Virginia Surface Mining & Reclamation Assn., Inc., 452 U.S. 264, 101 S.Ct. 2352, 69 L.Ed.2d 1 (1981), for example, the Court rejected a claim that the Surface Mining Control and Reclamation Act of 1977, 91 Stat. 447, 30 U.S.C. §1201 et seq., effect a taking . . .

Id. at 105 S.Ct. 3116-3117.

The MacDonald and Williamson County cases, while recognizing that a taking does not occur until the point of time that all economically viable use and/or all investment backed expectations are taken, also spoke of ripeness for judicial consideration as did the Lucas case.[20] Under the rulings of this Court in the Lucas, Keystone, Hodel, Agins[21],

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[19]Williamson County Regional Planning v. Hamilton Bank, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985).

[20]Lucas v. South Carolina Coastal Council, supra, at 112 S.Ct. 2891.

[21]Agins v. City of Tiburon, 447 U.S. 261, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980).

MacDonald, and Williamson County cases, a Plaintiff's claim is ripe, and a regulatory taking has occurred when, but not until, the government makes a final decision that takes all economically viable use of the property and fails to compensate the Plaintiff for the taking. The final decision of the State in this case did not occur until 1991 when the state archaeologist refused to disinter and rebury the ancient human remains. At that time in 1991, but not until then, was the case ripe for review or was there a taking. The majority decision of the Iowa Supreme Court erred in failing to find that the taking in this case occurred in 1991 which entitles these Plaintiffs to just compensation.

The majority decision of the Iowa Supreme Court incorrectly established 1978 as the date of ripeness and the date of taking, based on the premise that the Ancient Human Remains statutes were passed in 1976 and 1978. The effect of establishing 1978 as the ripeness and the taking date is to preclude all existing property owners in the state from receiving any compensation for a regulatory taking under these statutes after 1983, since there is a five year statute of limitations[22] on an action for damage to real property. All claims and actions for a regulatory taking by existing property owners under these statutes brought after 1983 would be improperly barred by the ruling of the majority decision.[23]

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[22]Section 614.1(4), Code of Iowa.

[23]As previously discussed, the majority decision of the lower court precludes all purchases of land after 1978 from receiving just compensation for a regulatory taking under these ancient human remains statues.

The majority decision of the Iowa Supreme Court is in violation of the Fifth Amendment which guarantees just compensation for inverse condemnation. The guaranty of just compensation comes from that self-executing Constitutional provision. "[I]n the event of a taking, the compensation remedy is required by the Constitution."[24]

The majority decision of the Iowa Supreme Court is also contrary to the general principle that an action for inverse condemnation accrues when the taking is complete. The First English case recognizes that an inverse condemnation occurs at the point of time when the regulation goes to the extent that all economically viable use of the property is taken. This Court in the First English case stated that a property owner is entitled to just compensation in the event or when the "government action that works a taking" occurs.[25]

"Generally, a cause of action for inverse condemnation accrues for limitation purposes, when the taking is complete, though the precise time when the taking takes place may depend upon the facts and circumstances of each case."[26] Also, under the "discovery rule" a cause of action does not accrue until a claimant knows or should reasonably know of

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[24]First English Evan. Luth. Ch. v. Los Angeles Cty., supra at 107 S.Ct. 2386.

[25]482 U.S. at 316, 107 S.Ct. at 2386.

[26]54 C.J.S. Limitation of Actions §176, p. 229.

the existence of his claim.[27] The Plaintiffs did not know nor should have reasonably known that the state archaeologist would make a significant find of ancient human remains on Lot 15 and refuse to allow them to be disinterred and reburied, until that action occurred in 1991. Under the "discovery rule" the Plaintiffs' cause of action in this matter accrued in 1991.

Under the Ancient Human Remains statutes in this case there was no final decision until the state archaeologist refused to disinter and rebury the remains in 1991. The State contemporaneously in 1991 denied the Plaintiffs any compensation for this taking. It was at this time in 1991, but not until this time in 1991, that (1) this matter was ripe for judicial action, (2) that a taking occurred, and (3) the statute of limitations for Plaintiffs bringing an inverse condemnation action began to run.

Amplification from this Court is needed to clarify and confirm the rule that in reference to a regulatory taking that:

1. A taking does not occur until a final decision implementing an enabling statue is made by the government which results in a taking of all economically viable use of the property, for which the government refuses to provide just compensation.
2. An action is not ripe for judicial consideration until a final decision is made by the government which results in a taking of all economically

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[27]The Iowa Supreme Court has recognized the discovery rule in numerous situations. See, Milluright v. Romer, 322 N.W.2d 30 (Iowa 1982); Baines v. Blenderman, 223 N.W.2d 199 (Iowa 1974); Brown v. Ellison, 304 N.W.2d 197, 200-201 (Iowa 1981); Vacura v. Plott, 666 F.2d 1200 (8th Cir. 1981).

viable use of the property, for which the government refuses to provide just compensation.

3. An action for inverse condemnation concerning a regulatory taking accrues under statutes of limitations when a final decision made by the government implements an enabling statute which results in a taking, for which the government refuses to provide just compensation.

The taking in this case occurred in 1991. It was at that same time that Plaintiffs' action accrued and was ripe for judicial consideration. These Plaintiffs are entitled to just compensation for this regulatory taking.

II. A RULE IS NEEDED TO ESTABLISH THAT THERE IS A DIFFERENCE BETWEEN A STATUTE THAT IMMEDIATELY AND DIRECTLY REGULATES PROPERTY AND AN ENABLING STATUTE THAT MAY IN THE FUTURE BE IMPLEMENTED TO REGULATE PROPERTY

There is a distinction between statutes that immediately and directly regulate property such as in the Lucas case, and enabling statutes as in this case that, if implemented, may be used to regulate property. In the Lucas case the 1988 South Carolina statute in question immediately and directly regulated the Lucas property to the extent that it took all economically viable use from that property.

The Court of Claims in the case of Formanek v. United States[28] dealt with an enabling statute. In the Formanek case the Federal Water Pollution Control Act (Clean Water Act) 33 U.S.C. §1334 was passed prior to Mr. Formanek's purchase of the property in question. A botanist for the DNR's Natural Heritage Program studied the Formanek property for a period of time, and thereafter determined that the property contained a calcareous fen plant community of ecological significance that should be preserved. The U.S. Corp. of Engineers then denied Mr. Formanek a permit that would have allowed him to develop this land lying within the Minneapolis-Saint Paul, Minnesota Metropolitan area. The Court in awarding Mr. Formanek just compensation ruled that the "permit denial constituted a taking under the Fifth Amendment for which the public, and not the individual property owner, must bear the burden."[29]

Our present case, the Formanek, Keystone, Hodel, MacDonald and Williamson County cases involve enabling statutes. A rule is needed to establish that there is a difference between enabling statutes and statutes that immediately and directly regulate a property. That rule needs to provide that a regulatory taking occurs when, but not until, the implementation of the enabling statute against the property deprives the owner of all its economically viable use.

Under such a rule these Plaintiffs are entitled to just compensation for this regulatory taking.

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[28]26 Ct.Cl. 332 (1992).

[29]26 Ct.Cl. at 341.

III. THIS COURT SHOULD ACKNOWLEDGE THE RIGHT TO ASSIGN AN INVERSE CONDEMNATION CLAIM

In this case the Plaintiffs refunded the purchase price to Dr. Fleming and took back Lot 15. In his Quit Claim Deed to the Plaintiffs, Dr. Fleming conveyed all his right, title, interest, estate, claim and demand in Lot 15. Both the majority and dissenting opinions of the lower court, without discussion of the issue, correctly recognized that the Plaintiffs had been assigned Dr. Fleming's inverse condemnation action, and are entitled to pursue this inverse condemnation case.

Generally, interests in real property, whatever their extent or nature may be, are assignable.[30] Also, a right of action for injury to real property is assignable.[31] The Iowa Supreme Court has held that an assignment transfers to the assignee the assignor's entire interest or rights in property.[32]

This Court in the Spiller case[33] held that an action arising from wrongs causing injury to real or personal property, or from torts by which an estate, real or personal, has been injured, diminished or damaged, may be assigned. The Spiller case involved recovery for reduction in the value

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[30]6A C.J.S. Assignments §13, 6 AmJur2d Assignments §§23-26.

[31]6A C.J.S. Assignments §39, 6 AmJur2d Assignments §§41 and 44.

[32]Padzensky v. Kinzebaw, 343 N.W.2d 467, 471 (Iowa 1984); Kintzel v. Wheatland Mutual Insurance, 203 N.W.2d 799, 806 (Iowa 1973); Wiere v. The City of Davenport and Plummer, 11 Iowa 49 (1860).

[33]Spiller v. Atchison T. & S.F.R. Co., 253 U.S. 117, 64 L.Ed. 810, 80 S.Ct. 466 (1920).

of cattle due to excessive freight charges. That action was assigned to a cattlemen's association for collection of reparations before the Commerce Commission. This Court held that assignment of the action to recovery for the reduction in value to the cattle was valid and proper.

Likewise, the assignment of an action in inverse condemnation for the damage to real property is proper and valid. The validity of the assignment of an inverse condemnation should be affirmed by this Court. The Fifth Amendment provides that private property shall not be taken for public use without just compensation. There is no prohibition to assigning the right to recover just compensation.

The Fifth Amendment ensures that just compensation will be paid in the event of an inverse condemnation, whether or not the right to that compensation has been assigned. The right to bring an inverse condemnation action is a result of "the self-executing character of the constitutional provision with respect to compensation . . ."[34]

"The form of the remedy did not qualify the right (of inverse condemnation). It rested upon the Fifth Amendment. Statutory recognition was not necessary. A promise to pay was not necessary. Such a promise was implied because of the duty to pay imposed by the Amendment. The suits were thus founded upon the Constitution of the United States."[35]

"[T]he Court has frequently repeated the view that, in the event of a taking, the compensation remedy is required by

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[34]United States v. Clarke, 445 U.S. 253, 257, 100 S.Ct. 1127, 1130, 63 L.Ed.2d 373 (1980).

[35]Jacobs v. United States, 290 U.S. 13, 16, 54 S.Ct. 26, 27, 78 L.Ed. 143 (1933).

the Constitution."[36] "Thus, government action that works a taking of property rights necessarily implicates the 'constitutional obligation to pay just compensation.' Armstrong v. United States, 364 U.S. 40, 49, 80 S.Ct. 1563, 1569, 4 L.Ed.2d 1554 (1960)."[37]

Since the Constitution guarantees and requires payment for a taking, the assignment of an inverse condemnation should not prevent payment for the taking. If the right to recover just compensation were not assignable, the government would get a windfall by avoiding payment in situations as presented in this case. The government should pay for what it has taken, whether or not the payment is assigned to another party. In our present case the Plaintiffs assumed ownership of Lot 15 as well as being assigned all of Dr. Fleming's right, title, interest, estate, claim and demand in Lot 15. The Plaintiffs clearly are properly entitled to stand in the shoes of Dr. Fleming in this inverse condemnation action seeking just compensation for the regulatory taking of Lot 15.

This court should acknowledge the right to assign an inverse condemnation action.

CONCLUSION

The lower court in conflict with the previous decisions of this Court in the Lucas, Keystone, Hodel, First English, MacDonald and Williamson County cases erred in failing to rule that a regulatory taking occurs at the point of time, but

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[36]First English Evan. Luth. Ch. v. Los Angeles Cty., 482 U.S. 304, 316, 107 S.Ct. 2378, 2386, 96 L.Ed.2d 250 (1987).

[37]Id., at 315, 107 S.Ct. at 2386.

not until, the impact of government action takes all the economically viable use of the property. Amplification is needed to clarify that a regulatory taking under an enabling statute occurs, accrues and is ripe at the point of time, but not until, the statute is implemented to impact the property to the extent that all economical use of the property is taken. A rule is needed to establish the difference between an enabling statute and one that immediately and directly regulates property. A rule is also needed to establish that an inverse condemnation claim is assignable. The erroneous ruling of the lower court needs to be reversed so that it will not be precedent to deny just compensation to property owners who purchase property after an enabling statute is passed, but prior to the statute being implemented against the property. The erroneous ruling of the lower court needs to be reversed to allow these Plaintiffs just compensation for the regulatory taking in this case.

Petitioners pray that Certiorari be granted.

Dated: December 19, 1994.

Respectfully submitted,

ROBERT W. GOODWIN of
GOODWIN LAW OFFICE, P.C.

Attorney for Petitioners
ERBEN A. HUNZIKER, DONALD M. FURMAN, R. FRIEDRICH AND SONS, INC. and BUCK CONSTRUCTION COMPANY, INC.

APPENDIX A

IN THE SUPREME COURT OF IOWA

No. 176/93-302

Filed July 27, 1994

ERBEN A. HUNZIKER, DONALD M. FURMAN, R. FRIEDRICH AND SONS, INC. and BUCK CONSTRUCTION COMPANY, INC.,
Appellants,

vs.

STATE OF IOWA,
Appellee.

Appeal from the Iowa District Court for Story County, Carl E. Peterson, Judge.

Appeal from district court grant of summary judgment.

AFFIRMED.

Robert W. Goodwin of the Goodwin Law Office, Ames, for appellants.

Bonnie J. Campbell, Attorney General, Elizabeth M. Osenbaugh, Deputy Attorney General, and Michael H. Smith, Assistant Attorney General, for appellee.

Considered by McGiverin, C.J., and Carter, Lavorato, Snell, and Ternus, JJ.

LAVORATO, Justice.

The issue in this case is whether the district court properly concluded as a matter of law that the plaintiffs were not entitled to compensation on a regulatory taking theory for land they own. We think the district court was correct and we affirm.

The plaintiffs--Erben A. Hunziker, Donald M. Furman, R. Friedrich and Sons, Inc., and Buck Construction Company, Inc.--are land developers. In May 1988 they purchased a fifty-nine acre tract of farm land to develop. The plaintiffs platted the tract as the Second Addition, Northridge Parkway Subdivision.

In May 1990 the plaintiffs sold lot 15 in the addition for $50,000. The buyer--Dr. Jon Fleming--planned to build a home on the lot.

In April 1991 the state archaeologist learned that lot 15 has a Native American burial mound on it. The state archaeologist probed lot 15 and found some human bones. Studies indicated that the burial mound on lot 15 was made between 1000 and 2500 years ago by Native Americans of the Woodland Period.

Pursuant to Iowa Code section 305A.9 (1991), the state archaeologist prohibited disinterment of the burial mound and required a buffer zone around the mound to ensure its protection. Given the size of lot 15, the location of the mound near the center of the lot, and the need for the buffer zone, construction of a house on lot 15 was not feasible. Because of (1) the state archaeologist's determination, (2) the prohibition against disinterment,

and (3) the buffer zone requirement, the city refused to issue a building permit for lot 15.

The plaintiffs refunded the purchase price to Dr. Fleming and took the lot back. The plaintiffs then brought this mandamus action, alleging the State's action amounted to a regulatory taking without compensation. The plaintiffs asked the court to enter a writ of mandamus commanding the State to condemn lot 15 and provide them just compensation for it.

Both parties moved for summary judgment. The district court granted the State's motion and denied the plaintiffs' motion. The court also overruled the plaintiffs' subsequent motions. The plaintiffs appealed.

I. Scope of Review.

Because mandamus is an equitable action, our review is de novo. Fitzgarrald v. City of Iowa City, 492 N.W.2d 659, 663 (Iowa 1992). Mandamus is a procedural device to compel condemnation when there has been a taking of private property for public use without just compensation. Phelps v. Board of Supervisors, 211 N.W.2d 274, 276 (Iowa 1973). Mandamus is limited to determining

> whether a factual issue exists that would permit a condemnation commission or a jury on appeal of an award to find an intrusion that produced a measurable decrease in the property's market value. The mandamus court may find the evidence insufficient as a matter of law to compel the summoning of a condemnation commission, but that court is simply not called upon to rule as a matter of law that a taking has occurred. To do so would create an undesirable issue preclusion

> problem in a later trial of a condemnation proceeding. It is for the condemnation commission or trial jury to fix the loss of value, if any, suffered by the property owner.

Fitzgarrald, 492 N.W.2d at 663-64. So our task here is to determine whether the district court correctly determined there was no factual issue that would permit a finding of a compensable intrusion. This, of course, is the same question posed by a motion for summary judgment. Hasbrouck v. St. Paul Fire & Marine Ins. Co., 511 N.W.2d 364, 366 (Iowa 1993).

II. Whether There Was a Factual Issue That Would Permit a Finding of a Compensable Intrusion.

In its summary judgment motion, the State urged, among other things, that the plaintiffs never had a vested property right under statutory or common law to build a house on an ancient burial mound. For this reason, the State argued, no regulatory taking occurred. The district court agreed and entered summary judgment in favor of the State.

A. Applicable law. The Fifth Amendment to the federal Constitution provides that "private property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V. This provision of the Fifth Amendment is made binding on the states through the Fourteenth Amendment to the federal Constitution. Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 160, 101 S. Ct. 446, 450, 66 L. Ed. 2d 358, 364 (1980). An Iowa Constitutional provision similarly provides that "[p]rivate property shall not be taken for public use without just compensation first being made. . . ." Iowa Const. art. I, § 18.

"Taking," for purposes of the federal and Iowa constitutional right of just compensation,

> does not necessarily mean the appropriation of the fee. It may be anything which substantially deprives one of the use and enjoyment of his property or a portion thereof.

Phelps, 211 N.W.2d at 276.

Here the plaintiffs' claim for compensation is based on what has been referred to as inverse condemnation. Inverse condemnation is

> a shorthand description of the manner in which a landowner recovers just compensation for a taking of his property when condemnation proceedings have not been instituted.

United States v. Clarke, 445 U.S. 253, 257, 100 S. Ct. 1127, 1130, 63 L. Ed. 2d 373, 377 (1980).

Land-use regulation does not effect a taking requiring compensation if it substantially advances a legitimate state interest. Lucas v. South Carolina Coastal Council, 505 U.S. ____, ____, 112 S. Ct. 2886, 2897, 120 L. Ed. 2d 798, 818 (1992). There are two exceptions. When the regulation (1) involves a permanent physical invasion of the property or (2) denies the owner all economically beneficial or productive use of the land, the State must pay just compensation. Id. at ____, 112 S. Ct. at 2900, 120 L. Ed. 2d at 821; Iowa Coal Mining Co. v. Monroe County, 494 N.W.2d 664, 670 (Iowa 1993).

When the regulation denies the owner all economically beneficial or productive use of the land, the State--under limited circumstances--may resist payment of compensation. The limited circumstances include those instances where it can be shown that the property owner's "bundle of rights" never included the right to use the land in the way the regulation forbids. Lucas, 505 U.S. at ____, 112 S. Ct. at 2899, 120 L. Ed. 2d at 820; Iowa Coal Mining Co., 494 N.W.2d at 670. Whether or not the property owner's "bundle of rights" included the right to use the land in the way the regulation forbids is to be determined under state nuisance and property law. Lucas, 505 U.S. at ____, 112 S. Ct. at 2900, 120 L. Ed. 2d at 821.

B. Analysis. The Iowa legislature passed Iowa Code section 305A.7 in 1976. In 1978 the Iowa legislature passed Iowa Code sections 305A.9 and 716.5. Section 305A.7 provides in part:

> The state archaeologist shall have the primary responsibility for investigating, preserving and reinterring discoveries of

> ancient human remains. For the purposes of [this section] ancient human remains shall be those remains found within the state which are more than one hundred fifty years old. . . .

1976 Iowa Acts ch. 1158, § 7 (renumbered as Iowa Code section 263B.7 (1993)).

Section 305A.9 provides:

> The state archaeologist shall have the authority to deny permission to disinter human remains that the state archaeologist determines have state and national significance from an historical or scientific standpoint for the inspiration and benefit of the people of the United States.

1978 Iowa Acts ch. 1029, § 26 (renumbered as Iowa Code section 263B.9 (1993)).

Section 716.5(2) provides that a person commits criminal mischief in the third degree when the person

> [i]ntentionally disinters human remains that have state and national significance from an historical or scientific standpoint for the inspiration and benefit of the United States without the permission of the state archaeologist.

1978 Iowa Acts ch. 1029, § 50.

The plaintiffs do not challenge the findings of the state archaeologist that he made a significant find. Nor do they challenge the authority of the state archaeologist to designate an area as a significant find and to preserve that area pursuant to sections 305A.7 and 305A.9.

The plaintiffs, however, contend that if, in so preserving the find, the state archaeologist deprives the landowner of all beneficial use of the land--as in the case of lot 15--there has been a regulatory taking for which the owner is entitled to compensation. The plaintiffs interpret Lucas as requiring the State to show that even without sections 305A.7, 305A.9, and 716.5(2), the plaintiffs would not--under Iowa property law--have been able to construct a family residence on lot 15. The plaintiffs argue that because the State cannot make such a showing there has been a taking for which they should be compensated.

In addition, the plaintiffs believe that here a "taking" did not occur until the state archaeologist (1) made a significant find and (2) took action denying permission to disinter the human remains on lot 15. Because this did not happen until after the plaintiffs purchased the land, the plaintiffs argue there was a "taking" at that time. In support of their argument, the plaintiffs rely on language in Lucas that regulatory takings can happen from a law or decree and that such regulatory action may well have the effect of eliminating the land's only economically productive use.

Apparently, then, the plaintiffs concede the sections in question and the state archaeologist's determination with respect to lot 15 advance a legitimate state interest. Whether there has been a taking in the Lucas sense depends on two things. The first is whether the plaintiffs are correct that the State must show that, without sections 305A.7, 305A.9, and

716.5(2), the plaintiffs would not under Iowa property law have been able to construct a family residence on lot 15. The second is whether the taking occurred when the plaintiffs claimed it did.

We do not interpret Lucas as restrictively as the plaintiffs do. Section 305A.7 was in existence and therefore part of Iowa's property law some twelve years before the plaintiffs purchased the land in question. Sections 305A.9 and 715.5(2) were in existence and therefore part of Iowa's property law some ten years before the plaintiffs purchased the land in question. So the "bundle of rights" the plaintiffs acquired by their fee simple title did not include the right to use the land contrary to the provisions of those three Iowa Code sections. Any prohibited use of lot 15 is directly attributable to the provisions of these three Code sections. The plaintiffs took title to the land in question subject to the provisions of these sections. These sections and their resulting prohibitions concerning the use of land ran--so to speak--with the land.

In addition, in Lucas, the regulation in question was passed after the plaintiffs acquired title. In contrast, here the statutes--sections 305A.7, 305A.9, and 715.5(2)--were in existence at least a decade before the plaintiffs acquired title. This is an important distinction.

More important, implicit in the Supreme Court's "bundle of rights" analysis is that the right to use the land in the way contemplated is what controls. Here, when the plaintiffs acquired title, there was no right to disinter the human remains and build in the area where the remains were located. For that reason, there was no taking when the state archaeologist made the significant find and took action denying permission to disinter the human remains. We find

support for this conclusion in the following passage from Lucas:

> Where "permanent physical occupation" of land is concerned, we have refused to allow the government to decree it anew (without compensation), no matter how weighty the asserted "public interests" involved . . . though we assuredly would permit the government to assert a permanent easement that was a preexisting limitation upon the landowner's title. . . . We believe similar treatment must be accorded confiscatory regulations, i.e., regulations that prohibit all economically beneficial use of land: Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership. A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts--by adjacent landowners (or other uniquely affected persons) under the State's law of private nuisance, or by the State under its complimentary power to abate nuisances that affect the public generally, or otherwise.

Lucas, 505 U.S. at ____, 112 S. Ct. at 2900, 120 L. Ed. 2d at 821 (citations omitted) (emphasis added). Here, at the time the plaintiffs acquired title, the State, under existing

state law, could have prevented disinterment. This limitation or restriction on the use of the land inhered in the plaintiffs' title.

For all these reasons, there was--as a matter of law--no taking requiring payment of compensation. Because there was no fact issue on the issue of taking, the district correctly sustained the State's motion for summary judgment.

AFFIRMED.

All justices concur except Snell, J., who dissents.

SNELL, J. (dissenting).

I respectfully dissent.

This case is about whether the State of Iowa has the right to take a person's land and not pay for it. The majority opinion establishes the principle that the state can do that whenever it finds human bones over 150 years old buried on land that the state archaeologist declares has historical significance. I believe this is not the law of Iowa nor should it be.

The Fifth Amendment through the Fourteenth Amendment of the United States Constitution provides that the government shall not take private property for public use without just compensation. Agins v. City of Tiburon, 447 U.S. 255, 260, 100 S. Ct. 2138, 2141, 65 L. Ed. 2d 106, 111 (1980); Bakken v. City of Council Bluffs, 470 N.W.2d 34, 36 (Iowa 1991).

Iowa law has recognized the principle of inverse condemnation, when the government does not actually condemn property but its action amounts to the same thing. Scott v. City of Sioux City, 432 N.W.2d 144, 145 n. 1 (Iowa 1988). By establishing that an inverse condemnation has occurred, a property owner may recover just compensation. United States v. Clarke, 445 U.S. 253, 257, 100 S. Ct. 1127, 1130, 63 L. Ed. 2d 373, 377 (1980). In this mandamus action plaintiffs do not seek to prevent the state from preserving the burial mound site for historical or scientific benefit. They claim only that they are entitled to compensation for the economic loss that befalls them from the state taking their property. I find their claim to be just and supported by law.

The trial court granted the State's motion for summary judgment and the majority affirms on the ground that plaintiffs cannot prevail as a matter of law. I believe this result occurs from a misapplication of the statutory and common law. I would reverse the decision granting the State's summary judgment and remand for entry of an order sustaining plaintiffs' summary judgment motion.

We have recognized the inevitable danger to private property that exists if the "just compensation" requirements of the Fifth Amendment to the federal Constitution and article I, section 18 of the Iowa Constitution could be circumvented through the guise of police power regulation. Business Ventures, Inc. v. Iowa City, 234 N.W.2d 376, 381-82 (Iowa 1975). Although not every police power regulation that restricts some beneficial use of property creates a compensable taking the frustration of investment-backed expectations may constitute a taking for which compensation is due. Fitzgarrald v. City of Iowa City, 492, N.W.2d 659, 665 (Iowa 1992) (citing numerous cases).

Lot 15, the burial mound area, is part of an investment-backed expectation of plaintiffs in developing a 59-acre tract for homes. It had been sold for $50,000 and is now worth $100 because nothing can be built on it. The State argues that the plaintiffs caused their own loss by buying property without recognizing a burial mound was on it that they could not use for home development. The State also promotes the idea that plaintiffs are undeserving of compensation because they made so much money selling other lots in the 59-acre tract that their loss of Lot 15 is but a fraction of their investment and therefore "de minimus." This patronizing view of entrepreneurship is unfounded in law and economic reality.

The majority result is premised on the law quoted from Lucas v. South Carolina Coastal Council, 505 U.S. ____, ____, 112 S. Ct. 2886, 2899, 120 L. Ed. 2d 798, 820 (1992), and our state statutes. The language of the Lucas case relied upon is dictum expressing an undefined exception to the general rule that compensation must be paid for a taking. The holding of the Lucas case sustained the landowner's claim that a taking had occurred and rejected the State's argument that it owed no compensation because it was for the public benefit. The law established by Lucas actually supports the claim of plaintiffs in the case at bar. The Supreme Court in Lucas said:

> In general (at least with regard to permanent invasions), no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation.

Id. at ____, 112 S. Ct. at 2893, 120 L. Ed. 2d at 812.

> We think, in short, that there are good reasons for our frequently expressed belief that when the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.

Id. at ____, 112 S. Ct. at 2895, 120 L. Ed. 2d at 815.

> In the case of land, however, we think the notion pressed by the Council that title is somehow held subject to the "implied limitation" that the State may subsequently eliminate all economically valuable use is inconsistent with the historical compact recorded in the Takings Clause that has become a part of our constitutional culture.

Id. at ____, 112 S. Ct. at 2900, 120 L. Ed. 2d at 820.

> As we have said, a "State, by ipse dixit, may not transform private property into public property without compensation . . . ."

Id. at ____, 112 S. Ct. at 2901, 120 L. Ed. 2d at 823 (quoting Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 164, 101 S. Ct. 446, 452, 66 L. Ed. 2d 358, 367 (1980)).

The prohibition by the State of Iowa from using the burial mound in the instant case is a complete taking because there is no practical use of it left to the plaintiffs. It is more insidious than zoning laws that we have held to effect a taking when they deny the economically viable use of the land. See Agins, 447 U.S. at 260, 100 S. Ct. at 2141, 65 L. Ed. 2d at 112; Osborn v. City of Cedar Rapids, 324 N.W.2d 47, 474 (Iowa 1982); Woodbury County Soil Conservation Dist. v. Ortner, 279 N.W.2d 276, 278 (Iowa 1979). It is pernicious because there is virtually no notice to a landowner of the State's claim and no opportunity to review the government action or appeal to the courts.

The Iowa statutes cited as preventing full ownership of land containing a burial mound give no notice of the State's inchoate claim of authority to deny compensation while prohibiting use. See Iowa Code §§ 263B.7, 263B.9, and 716.5(2) (1993). Nor do they state or even imply that land with a burial mound bears a perpetual cloud on the title removable only by authority of the state archaeologist. Section 305A.9, giving the state archaeologist authority to deny permission to disinter human remains, is not a self-executing statute creating a covenant running with the land. By its own terms the statute is activated only by an application for permission to disinter. Moreover, there is no indication from the language of these statutes that the legislature intended to take property for historical or scientific inspiration without paying for it.

In this case, a dead bones doctrine has risen from the soil, like a phoenix, to consume the live marrow of land ownership. The history surrounding these ancient bones should be preserved by granting compensation for its resurrection.

APPENDIX B

B 1

IN THE SUPREME COURT OF IOWA
No. 93-302

O R D E R

ERBEN A. HUNZIKER, DONALD M. FURMAN, R. FRIEDRICH AND SONS, INC. and BUCK CONSTRUCTION COMPANY, INC.,
Appellants,

vs.

STATE OF IOWA,
Appellee.

After consideration by the court, en banc, appellants' petition for rehearing in the above-captioned case is hereby overruled and denied.

Dated this 21st day of September, 1994.

THE SUPREME COURT OF IOWA

Arthur A. McGiverin
Chief Justice

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